BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1199473**
FED EX GROUND, INC. **1000 FedEx Drive** **Coraopolis, PA 15108** **Employer**	**DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board, acting pursuant to authority vested in it by the California Labor Code and having granted FedEx Ground, Inc.'s (Employer) Petition for Reconsideration, renders the following decision after reconsideration.

Jurisdiction

On December 23, 2016, the Division of Occupational Safety and Health (Division) initiated an inspection of Employer's worksite in Bloomington, California. On April 9, 2017, the Division issued one citation alleging a Serious Accident-related violation of section 3314, subdivision (c), with a $18,000 of penalty. Employer appealed the citation.

On May 31, 2019, the Board's Administrative Law Judge (ALJ) held a one day hearing. After the hearing, the ALJ upheld the violation with its Serious Accident-related[1] classification, and she rejected Employer's Independent Employee Action defense (IEA defense). Employer challenges the ALJ's Decision. It further contends, "(1) the ALJ exceeded her authority by ignoring key provisions in section 3314 and not following well-established precedent by the Board; (2) the evidence did not justify the findings of fact; and (3) the findings of fact did not support the order or decision." (Employer's Petition, p. 2; Lab. Code, § 6617, subds. (a), (c), (e).)

The Board granted Employer's Petition for Reconsideration.

Findings of Fact

1) On December 19, 2016, facer Hugo Cortez noticed a jam had occurred in the photo eye—a mechanism that reads the packages, sorts them based on the type of the package, and distributes them with conveyor belts to the proper area.

2) The parties stipulated employee Cortez suffered serious injuries while he went on top of the conveyor to unjam the machinery.

3) There was no supervisor to monitor the area of the accident. Further, closed circuit cameras did not monitor that area.

[1] In its petition, Employer does not dispute the Accident-related classification; therefore, the Board need not address this uncontested issue.

4) There was no supervisor specific to facers. Sort Manager Rico Adame spent the majority of his time on the first floor and rarely went to the second floor level, except on occasion.

5) Operations Manager Robert Garcia was in the central room monitoring the closed circuit cameras. He had multiple other responsibilities, including being in charge of running the entire building, monitoring the jam points and the areas where the belt stopped working, monitoring the volume they were expecting, communicating with all levels through his radio, and conducting daily pre-sort meetings.

Issues

1) Does Employer correctly assert the facts and circumstances of this case fall under the exception applicable to section 3314, subdivision (c)?

2) Assuming the exception does not apply, did Employer establish the third element of IEA defense?

3) Assuming the Board upholds the violation, did the Employer rebut the Serious violation presumption the Division established?

Analysis

1) Does Employer correctly assert the facts and circumstances of this case fall under the exception applicable to section 3314, subdivision (c)?

Citation 1, Item 1 alleges a violation of section 3314, subdivision (c), stating:

> Machinery or equipment capable of movement shall be stopped and the power source de-energized or disengaged, and, if necessary, the moveable parts shall be mechanically blocked or locked out to prevent inadvertent movement, or release of stored energy during cleaning, servicing and adjusting operations. Accident prevention signs or tags or both shall be placed on the controls of the power source of the machinery or equipment.

The Division's alleged violative description states,

> Prior to and during the course of the inspection, including but not limited to, December 19, 2016, the employer failed to ensure that conveyor in the sorter area was de-energized or disengaged and or mechanically blocked to stop inadvertent movement when clearing and unjamming the Conveyor. As a result, at approximately 1:30 PM, on December 19, 2016, an employee sustained a serious injury while clearing or unjamming the conveyor.

In its Petition, Employer does not dispute a violation of section 3314, subdivision (c), occurred. Therefore, it has waived argument on this point and the Board need not address this issue. (Lab. Code, § 6618.)

However, Employer argues an exception enumerated in the regulation applies, excusing it from the violation. An exception to the requirements of a safety order is in the nature of an affirmative defense, which the employer has the burden of raising and proving at hearing. (*Dade Behring, Inc*., Cal/OSHA App. 05-R2D1-2203, Decision After Reconsideration (Dec. 30, 2008).) The exception at issue states,

> Minor tool changes and adjustments, and other minor servicing activities, which take place during normal production operations are not covered by the requirements of Section 3314 if they are routine, repetitive, and integral to the use of the equipment or machinery for production, provided that the work is performed using alternative measures which provide effective protection. (Underline added.)

As evident by its plain terms, the exception applies under the condition that "the work is performed using alternative measures which provide effective protection." (§ 3314, subd. (d)(1) ["EXCEPTIONS to subsections (c) and (d)"].) Here, it is undisputed the accident occurred while injured employee Cortez was on top of the conveyor, attempting to unjam the machine. The Board does not deem such a measure an alternative that provides effective protection to employees. On this basis alone, the exception does not apply to the facts and circumstances of this case.

The Board's conclusion that the exception does not apply is further supported by an alternative basis: the unjamming operation at issue was not a minor servicing activity. Inspector Dhillon testified employees tried to unjam the machinery with a pole first but it did not work. His interview notes of employee Cortez corroborate his testimony. The note indicates Mr. Cortez told him "that time there was jam stick available in that area. Jam stick would not help to unjam the conveyor by removing string from photo eye sensor that cause shut down [of the] conveyor." (Exhibit 3B.) It was after this attempt that employee Cortez went on top of the conveyor to fix the jamming issue. That the jam stick would not unjam the machinery further demonstrates the unjamming operation at issue was not a minor servicing activity as Employer claims.

The Board concludes Employer failed to demonstrate the facts and circumstances of this case fall under the enumerated exception. The Board upholds the Division's citation.

2) Assuming the exception does not apply, did Employer establish the third element of Independent Employee Action defense?

There are five elements to the IEA defense, all of which must be shown by an employer in order for the defense to succeed: (1) the employee was experienced in the job being performed; (2) the employer has a well-devised safety program; (3) the employer effectively enforces the safety program; (4) the employer has a policy of sanctions which it enforces against employees who violate the safety program; and (5) the employee caused the safety violation which he knew was contra to employer's safety rules. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133,

Decision After Reconsideration (Oct. 16, 1980); *Cal Pac Sheet Metal, Inc*., Cal/OSHA App. 13-0547, Denial of Petition for Reconsideration (Oct. 8, 2014).)

In her decision, the ALJ concluded Employer established elements one, two, four, and five—employee Cortez was experienced in performing his job, employer had a well-devised safety program, employer had a policy of sanctions, and employee Cortez violated Employer's safety rules knowingly. The parties do not dispute the ALJ's findings on these elements; therefore, the Board need not discuss them further. (Lab. Code, § 6618.)

In its Petition, Employer disputes the ALJ's finding against Employer on element three, wherein she found Employer failed to effectively enforce its safety program. Employer claims the third element "does not require 24/7 surveillance of employees or require supervision at every turn." (Employer's Petition, p. 11.) But, 24/7 surveillance is not what the ALJ required. In her decision, the ALJ recognized Employer had some methods of enforcing its safety program. For instance, she mentioned Mr. Garcia's testimony on conducting both the daily pre-sort meetings at the beginning of each shift and the monthly structured safety meeting. She also discussed his testimony on Employer's policy that requires employees to say something if they see something. She held this was a form of monitoring employees.

Rather than dictating 24/7 surveillance, the ALJ merely found the preponderance of the evidence did not establish effective enforcement. The ALJ discussed several facts supporting her conclusion of ineffective enforcement: the closed circuit cameras in the control room did not observe the area of the accident; sort manager Adame's testimony that he typically walked around the first level and rarely went to the second floor level; injured employee Cortez's statement to inspector Dhillon that no supervisor watched him; and the two closest supervisors to Mr. Cortez were on the first level and could not see Mr. Cortez. She further found, "No one could see what Cortez was doing unless that person went to his area" and "the accident is the only reason Employer learned Cortez got up on the conveyor." Further, the ALJ noted, "Cortez could not be expected to use his radio to inform his managers that he intended to violate Employer's safety rule against getting on conveyor." Balancing all of this evidence, the ALJ held the preponderance of the evidence showed Employer did not provide adequate supervision reasonably necessary to effectively enforce its safety program.

We now evaluate whether the ALJ erred in her conclusions as to the third element. The Board has held for employers to meet the third element of the IEA defense, i.e., effective enforcement, they must provide evidence of meaningful, consistent enforcement. (*FedEx Freight, Inc.,* Cal/OSHA App. 317247211, Decision After Reconsideration (Dec. 14, 2016).) "An essential ingredient of effective enforcement is provision of that level of supervision reasonably necessary to detect and correct hazardous conditions and practices." (*Ibid.*) The necessary level of supervision is a fact-intensive inquiry that requires a case by case determination.

After independently reviewing the record, the Board agrees with the ALJ that while there is evidence of some enforcement measures by the Employer, the evidence in the record, in aggregate, preponderates in favor of a finding that Employer did not provide adequate supervision.

Preliminarily, we observe Employer's safety program has numerous positive features. Employer provided evidence demonstrating it has a generally adequate training program (initial hiring training, daily pre-sort safety meetings, and monthly structured safety trainings), disciplinary records, and written safety policies and procedures. However, absent evidence of adequate supervision reasonably necessary to enforce these safety measures, employers cannot establish effective enforcement.

Sort manager Adame testified managers were not present or stationed at the area of the accident to see the accident occurring. He stated he spends the majority of his time on the 1st floor. Mr. Adame testified he mainly spent his time "on the second level. I rarely go up there but on occasion" if something has broken down to discuss with maintenance how long it will take to fix the issue. According to Mr. Adame, he supervised 30 to 37 managers who each manage 10 to 20 employees. Mr. Adame further testified at the time of accident, there was no manager specific to facers but if an issue arose, facers could reach out to Operations Manager Garcia with their radios. Testimony in the record further established there were other managers present at the facility but they were stationed on the first floor and facers needed to go down to the first floor level to physically reach them.

Mr. Garcia testified he was in the central room with all the closed circuit cameras and he had multiple other job responsibilities, including being in charge of running the entire building, monitoring the jam points and the areas where the belt stopped working, monitoring the volume they were expecting, communicating with all levels through his radio, and conducting daily pre-sort meetings. Testimony in the record establishes the facility at issue was a huge one with miles and miles of conveyor belts.

Here, given the length of the belts, Mr. Garcia's vast array of responsibilities, and the testimony of Mr. Adame, Employer did not provide sufficient supervision for its facers. (*Preferred Framing, Inc.*, Cal/OSHA App. 00-3419, Decision After Reconsideration (Dec. 24, 2002) [holding employer failed to demonstrate effective enforcement because having one supervisor to supervise 35 to 40 carpenters who were spread all over the site in addition to the supervisor doing whatever else was necessary to keep the project on track was not adequate supervision].)

There was testimony in the record that by the time of the hearing, Employer had designated a manager specific to facers and the Board applauds Employer for its efforts to provide a safe work environment for its employees. However, at the time of the Division inspection, Employer did not have adequate supervision over its facers (as explained above) and this is sufficient on its own for the Board to conclude Employer did not provide adequate supervision to detect and correct safety hazards, demonstrating Employer did not satisfy the third element.

Lack of adequate supervision is also demonstrated through other evidence. Mr. Dhillon testified Mr. Cortez told him he went on the conveyor because it was busy season (Christmas time) and they faced a lot of pressure from management to finish their work fast. Mr. Dhillon's interview notes show employee Enrique told him it was general practice of the company to go up on a conveyor to unjam the machinery. (Exhibit 3D.) Mr. Dhillon's interview notes with operations manager Gracia also state that Mr. Cortez climbed on top of the conveyor "to fix it quickly and have conveyor running without having manager or maintenance person informed"

and Mr. Garcia further told inspector Dhillon, "it is for package handler (facer) a common practice for quick fix."

During the hearing, Mr. Garcia testified he only told Mr. Dhillon what he thought was employee Cortez's state of mind so if Mr. Cortez told him he did not call the manager because he thought he could fix the jamming issue quickly then Mr. Garcia just repeated what employee Cortez told him. He clarified there was no such common practice but this was Mr. Cortez's short cut.

Employer disputes the Division's argument that it was common practice at its worksite for employees to go on top of the conveyors to unjam the machinery and the Board need not and will not decide whether it was so in light of Employer's evidence and testimony demonstrating the opposite. However, as Mr. Garcia clarified and testified in the hearing, the Board finds at the very least, the interview notes and Mr. Dhillon's testimony demonstrate some employees, like employee Cortez, had their own quick fixes or short cuts when it came to unjamming the machinery. As inferred by the ALJ, this was made possible because closed circuit cameras did not capture the area of the accident, supervisors did not go on the second floor level regularly to monitor the employees, and the facers on the second floor knew that. Mr. Dhillon's interview notes of Mr. Cortez shows in response to the question "who was the supervisor on-site when the accident occurred?", he responded "no supervisor was watching employees." Again, absent providing adequate supervision to enforce Employer's safety rules and policies, Employer cannot meet the third element of the IEA defense. (*FedEx Freight, Inc.,* Cal/OSHA App. 317247211, Decision After Reconsideration (Dec. 14, 2016) [notwithstanding employer's training record, disciplinary procedure, and safety policy, it did not demonstrate effective enforcement since the record established employees stepped on the edge of the dock plate to get to the ladder numerous times contrary to the safety rules].) The Board concurs with the ALJ.

3) Assuming the Board upholds the violation, did the Employer rebut the Serious violation presumption the Division established?

Employer's Petition does not dispute the Division established the Serious violation presumption; therefore, that issue is waived and the ALJ's conclusion that the Division established the Serious violation presumption remains intact. (Lab. Code, § 6618.) Employer, however, argues it met its burden of rebutting the Serious violation presumption.

Labor Code section 6432, subdivision (c), states,

> (c) If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. The employer may accomplish this by demonstrating both of the following:
> (1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be

> expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).
>
> (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

To meet its burden, an employer must prove the elements enumerated in both subdivisions (c)(1) and (c)(2). (§ Lab. Code, § 6432, subd. (c) [Employer must demonstrate "both of the following…"].) In her Decision, the ALJ held Employer established subdivision (c)(2) because, after the accident, FedEx "built barriers around the end of the conveyor belt to prevent anyone from climbing on it at the location where the accident happened." (Decision, p. 11.) This conclusion is supported by testimony in the record. Sort manager Adame also testified that Employer has also now assigned a manager for the facers, which demonstrates an additional corrective measure. The Board concurs with the ALJ that Employer satisfied the second element necessary for rebutting the Serious violation presumption.

As to subdivision (c)(1), the ALJ held Employer did not effectively monitor or enforce its safety rules by failing to set up supervision to detect problems on the second floor level. "Due to lack of diligence, Employer was not aware that employees were climbing on the conveyor. An accident should not have happened in order for Employer to become aware that employees were climbing on the conveyor." (Decision, p. 11.) FedEx disputes this finding by reiterating its arguments mentioned above for the IEA defense.

However, as mentioned, the ALJ was correct to find Employer did not provide adequate supervision to assure effective enforcement of its safety rules—an action a reasonable and responsible employer would be expected to take to prevent and control the hazard. The hazard of employees going on top of conveyors to unjam machinery, given the frequency of such jams, was not unanticipated or unpredictable, particularly in circumstances where the Employer failed to engage in appropriate supervisorial efforts, as discussed above. This is to show Employer did not take "all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent" the hazard of employees jumping on top of conveyor belts. (Lab. Code, § 6432, subd. (c)(1) (underline added).)

Employer did not rebut the Serious violation presumption.

Decision

For the reasons stated, the Board affirms the ALJ's decision and upholds Citation 1.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Ed Lowry, Chair

Judith S. Freyman, Board Member

Marvin Kropke, Board Member

FILED ON: 04/20/2020

SUMMARY TABLE
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Inspection Number: 1199473
In the Matter of the Appeal of: FedEx Ground
Site address: 330 Resource Drive, Bloomington, CA 92316
Citation Issuance Date: 05/09/2017

Citation	Item	Section	Class. Type*	Citation/Item Resolution	Affirm or Vacate	Final Class. Type*	DOSH Proposed Penalty in Citation	FINAL PENALTY ASSESSED
1	1	3314 (c)	SAR	Decision After Reconsideration issued.	A	SAR	$18,000.00	**$18,000.00**
						Sub-Total		**$18,000.00**
							Total Amount Due**	**$18,000.00**

*See Abbreviation Key
**You may owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call 415-703-4310 or email accountingcalosha@dir.ca.gov if you have any questions.

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*Classification Type (Class.) Abbreviation Key:

Abbreviation	Classification Type	Abbreviation	Classification Type	Abbreviation	Classification Type
FTA	Failure to Abate	**RR**	Repeat Regulatory	**WR**	Willful Regulatory
G	General	**RS**	Repeat Serious	**WRG**	Willful Repeat General
IM	Information Memorandum	**S**	Serious	**WRR**	Willful Repeat Regulatory
NL	Notice in Lieu of Citation	**SA**	Special Action	**WRS**	Willful Repeat Serious
R	Regulatory	**SO**	Special Order	**WS**	Willful Serious
RG	Repeat General	**WG**	Willful General		